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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, individually and in his official capacity as acting Tax Commissioner for the State of West Virginia,
Appellant,

vs.

UNITED ARTISTS CORPORATION, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF AMICI CURIAE OF ATTORNEY GENERAL OF WASHINGTON et al.
And Motion For Leave to File the Same

G. W. HAMILTON,
Attorney General of the State of Washington,

R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Amici Curiae.

Temple of Justice, Olympia, Washington.

STATE PRINTING PLANT, OLYMPIA, WASHINGTON

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Come now G. W. Hamilton, Attorney General of the State of Washington, and R. G. Sharpe, Assistant Attorney General of the State of Washington, and move the Court for an order permitting said G. W. Hamilton and R. G. Sharpe to file the annexed brief *amici curiae* in the above entitled appeal.

This motion is based upon the records and files in

said appeal and upon the attached affidavit of R. G. Sharpe.

G. W. HAMILTON,
Attorney General of the State of Washington,
R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Amici Curiae.

State of Washington,
County of Thurston, } ss.

R. G. Sharpe, being first duly sworn, on oath, deposes and says: That G. W. Hamilton who signed the foregoing motion, is the duly elected, qualified and acting Attorney General of the State of Washington, and affiant is the duly appointed, qualified and acting Assistant Attorney General of the State of Washington; that ever since 1933 the statutes of the State of Washington, to-wit: chapter 191, Laws of Washington of 1933, and chapter 180, Title II, Laws of Washington of 1935, have imposed and do now impose an excise upon distributors of motion picture films of the same general kind and nature as that imposed by the statutes of West Virginia, the validity of which is involved in the above appeal, and that the decision in said appeal will be determinative of the validity of the excise so imposed by the Washington statutes, and that the State of Washington is therefore directly interested in the outcome of said appeal.

This affidavit is made in support of the attached motion for leave to file a brief *amici curiae.*

R. G. SHARPE,

Subscribed and sworn to before me this 28th day of November, 1938.

JENNIE M. TATTERSALL,
Notary Public in and for the State of Washington, residing at Olympia.

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ARGUMENT

Rental of motion picture films for exhibition in West Virginia is intrastate business subject to local taxation.

A careful search fails to reveal any decision of this Court squarely involving the right of a state to exact an excise tax for revenue only, under the facts shown by the record here. This Court has, however, decided that as soon as motion picture films are placed upon the exhibitor's reels they enter into consumption and become commingled with the general property of the state.

An Ohio statute provided for a board of censors to which all films were required to be submitted before being publicly exhibited in the state. The act related only to films after removal from the shipping cases and placed on reels to be publicly exhibited and displayed in the state. A fee was exacted of $1 for each reel of film examined. In holding such act not to be violative of the commerce clause, the Court said in *Mutual Film Co. v. Industrial Commission*, 215 Fed. (D. C.) 138, 146:

"While the films are in use for public exhibition within a given state, they are like any other property owned and used in the state. It can make no difference that all are not consumed through use in a particular state, and that such as survive are shipped into one or more other states and there similarly used; for in each instance commerce ceases where local use commences."

In affirming the district Court's decision, the Supreme Court said in *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U. S. 230, 240:

"There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges ready to be rented to exhibitors or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the state."

In *Eureka Productions v. Lehman*, 17 Fed. Supp. 259, 260, plaintiff sought an interlocutory injunction restraining state officials from interfering with the exhibition of a film imported from a foreign country, after refusal of such officials to grant a permit for such exhibition as provided by state law. In denying the relief sought the Court said, in part:

"* * * We think that censorship by statutory regulation in the state of New York constitutes no burden upon foreign commerce. The licensing provision

of the state statute applies equally to all films sought to be exhibited within the state. It is intended merely to regulate their local use. * * * Whether it be interstate or foreign commerce, the validity of a state statute is to be determined by its practical effect. * * * (citing cases) * * * This state regulation of a strictly local use can hardly be said to burden foreign commerce. In regulating the local exhibition of films, the state exercises its police power after the article has lost its character as an import and consquently does not invalidly interfere or conflict with the exercise of federal power. *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U. S. 230, * * *; *Fox Film Corp. v. Trumbull*, 7 F. (2d) 715 (D. C. Conn.)."

The Court then quoted excerpts from the *Mutual Film* case, including that above set out.

The order denying an interlocutory injunction was affirmed by this Court on authority (among other cases) of *Mutual Film Corp. v. Ohio Industrial Comm'n*, 236 U. S. 230, 240, 241, and *Mutual Film Corp. v. Kansas*, 236 U. S. 248, 258.

See *Eureka Productions Inc. v. Lehman*, 302 U. S. 634.

Again in *Boynton v. Fox West Coast Theatres Corp.* (C. C. A. 10th), 60 Fed. (2d) 851, 853, involving the validity of a Sunday closing law, it was said:

"It is urged that this statute, when applied to plaintiffs, contravenes the Federal Constitution, art. 1, § 8, subd. 3, because it regulates and directly burdens interstate commerce. It is well settled that a producer or manufacturer, who ships motion picture films from one state to lessees in another state to be exhibited by the lessees, is engaged in interstate commerce. *Binderup v. Pathe Exchange Inc.*, 263 U. S. 291 * * *. But, when an article that has been transported in interstate commerce has arrived at a destination and is there held for use or disposal, it then passes under the protection of

state law and becomes subject to the taxing and police power of the state." (citing numerous authorities)

A Connecticut law entitled "An act providing for the imposition of a tax on films," etc., prohibited the delivery of motion picture films for purpose of exhibition in the state without being registered and a tax paid thereon of $10 for each film of 1,000 feet or less, with 50 cents additional for each extra 100 feet. The law was attacked in *Fox Film Corp. v. Trumbull*, 7 Fed. (2d) 715, by two film distributing companies. The Fox Film Corporation, a New York distributing company, contracted with exhibitors in Connecticut through its salesmen who solicited contracts with such exhibitors. The contracts were, as here, subject to approval by the home office. Pursuant to such contracts, the films were shipped from New York either directly to the exhibitor in Connecticut or to a branch office in New Haven, which made delivery to the exhibitor. The other plaintiff, The American Feature Film Corporation, a Massachusetts distributing company with its principal place of business in Boston, conducted its business of entering into contracts and distributing films in the same way except that it had no branch office in Connecticut but shipped its films by parcel post or express directly to Connecticut exhibitors, which films were returned to the Boston office on completion of the exhibition. None of the photoplays involved were made in Connecticut. The three-judge court, after an extensive review of the authorities, held that whether regarded as a revenue measure or police regulation, the Connecticut law was not a regulation or restraint on interstate commerce as regards films shipped to lessees for exhibition, since it

operated alike on films brought into or produced in the state and only incidentally affected interstate commerce.

In *United Artists Corp. v. Taylor*, 288 N. Y. Supp. 946, 948, it was held that the fact that the transaction involving the licensing of motion picture films for exhibition originated in interstate commerce would not deprive a city of power to tax the disposition of films after arrival within the state. Said the Court:

"We agree with the determination of the comptroller that the transaction which is the subject of this appeal constituted a sale within the meaning of subdivision (e) of section 1 of Local Law No. 24 (published as No. 25, p. 165) of 1934. It constituted a transfer of the possession, in conjunction with a 'license to use' tangible personal property. We are also of opinion that even if such transactions be regarded as originating in interstate commerce (*Binderup v. Pathe Exchange, Inc.*, et al., 263 U. S. 291, 44 S. Ct. 96, 68 L. Ed. 308), the city is not deprived of the power to impose a tax upon the disposition of the films after arrival in this state (*Sonneborn Bros. v. Cureton*, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095; *Wiloil Corporation v. Commonwealth of Pennsylvania*, 294 U. S. 169, 55 S. Ct. 358, 79 L. Ed. 838; *Minnesota v. Blasius*, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131)."

The owning and leasing of taxicabs and the collection of rents therefrom is held to constitute the doing of business within the meaning of the Corporation Excise Tax Act. *Lacroix v. Motor Taximeter Cab Co.*, decided in connection with *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171.

In *Commonwealth v. National Cash Register Co.*, 117 Atl. 439, 271 Pa. 406, the defendant, an Ohio corporation, had on lease in Pennsylvania a large number of cash registers, under an agreement whereby the registers were delivered to prospective purchasers who, at the expiration

of the terms of the leases, agreed to purchase the registers or to surrender them. In the event of purchase the amount deposited with the company as security was applied to the purchase price; ownership, meanwhile, remaining in the company. It was held that the agreement was a bailment and not a sale; that the situs of the property was in Pennsylvania, and represented an investment there of capital of a company "doing business" in the state; and hence, that a state capital stock tax imposed by Pennsylvania might lawfully be measured by the value of such cash registers outstanding.

Refrigerator cars used in state, but owned by foreign corporation are not exempt from *ad valorem* taxes by reason of such use, and the state where used may impose its fair share of tax.

Jonnson Oil Co. v. Oklahoma, 290 U. S. 158 and cases cited.

Foreign corporation qualification cases.

In *Ligon v. Alexander Film Co.* (Tex.), 55 S. W. (2d) 1030 (Cert. denied, 289 U. S. 760), the facts were briefly these: a Colorado corporation conducted a studio in Colorado for the manufacture of motion picture films containing advertising matter relating to the business of its customers. Two Texas theatres contracted with the film company to exhibit films advertising the business of local merchants under contract wth the film company. These advertising contracts were not binding until approved by the film company in Colorado. By these contracts the local merchant subscribed for film advertising service consisting of advertising films produced in Colorado and shipped to the two Texas theatres and by them displayed.

The Court held that in carrying on such motion picture advertising service the film company was doing an intrastate business in Texas preventing its from suing in the Texas courts without complying with the Texas foreign corporations license laws. Said the Court (p. 1032):

"The circumstance that interstate commerce was involved in the manufacture and shipment of the films does not alter the intrastate character of the public exhibition of the advertising matter contained in the films."

Here the license agreement requires the exhibition of the exhibitor's film (Contract, par. 6, R. 19) and provides for the exaction of damages for failure to exhibit. (Contract, par. 3-b, R. 18.) There seems little, if any difference in principle, therefore, between the *Ligon* case, and that here involved.

In *Rex Beach Pictures Co. v. Garson Prod. Co.*, 209 Mich. 692, 177 N. W. 254, the plaintiff, a Maine corporation, as the owner of a motion picture known as "The Barrier," made a contract with a New York corporation for distribution of the picture. The New York corporation, as agent for, and with the express consent of, the Maine corporation, employed the Garson Production Company, a Michigan corporation, as the Michigan agent for the picture. The sole purpose of this agreement, according to the Michigan supreme court, was to create an agency or means whereby plaintiff, a foreign corporation, "in the conduct of its ordinary business, was to derive a continued revenue from the exhibition of its motion picture (of which it at all times remained the absolute owner) to audiences assembled in different Michigan theatres, and from revenues so derived to receive as its share of the income produced * * * 80% of the gross

receipts, income and revenue." The court held that the Maine corporation was carrying on business in Michigan and hence was required to comply with the Michigan laws licensing foreign corporations to do business within the state.

Short Films Syndicate Co. v. Standard Film Service Co., 39 Oh. App. 79, 176 N. E. 893, was an action to recover from an Ohio corporation certain amounts alleged to be due plaintiff, a New York corporation not licensed to do business in Ohio, under contracts of lease of motion picture films. The court held that the foreign corporation without a certificate was precluded from recovering in Ohio on contracts leasing films for subleasing to Ohio theatres, since such a transaction constituted "doing business in the state."

A foreign corporation has been held to be transacting business in a state requiring a license therefor where it has shipped machines into the state on long term leases with reservation of yearly or other rentals; there thus being a continuance of dealing by it with property in the state after interstate commerce had wholly ceased.

Davis v. United Shoe Repairing Mach. Co. (Tex. Civ. App.), 92 S. W. (2d) 1107;

United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 S. W. 567;

State ex rel. Hays v. Robertson, 271 Mo. 475, 196 S. W. 1132;

We will later (*post*, pp. 25-6) quote at some length from the case last cited.

Rental of film taxable locally for same reason that film itself is subject to local ad valorem taxation.

Since the use of the film for rental purposes is merely one of the rights and powers incident to its ownership, such use is just as truly subject to local taxation as is the film itself a legitimate subject of local property taxation.

The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constitutent elements.

Bromley v. McCaughn, 280 U. S. 124, 136-138;
Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249, 267-8.

"The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582.

The Binderup Case.

The case upon which appellee chiefly relies is *Binderup v. Pathe Exchange*, 263 U. S. 291. That was an action for triple damages for violation of the Federal Anti-Trust Act of 1890, brought against various distributors of motion picture films located in New York with branch agencies in Omaha, Nebraska. The methods of operation were, so far as the facts revealed in the opinion shows, in many ways similar to those followed by appellee here. The following language was used in connection with the court's conclusion that the film distributors had combined and conspired in restraint of trade and commerce among the several states in violation of the Anti-Trust Act, (263 U. S. 309-311):

"The film contracts were between residents of different states and contemplated the leasing by one to the other of a commodity manufactured in one State and transported and to be transported to and used in another. The business of the distributors of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one State, finding customers for it in other States, making contracts of lease with them, and transporting the commodity leased from the State of manufacture into the States of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination."

It is to be particularly noted that the plaintiff, Binderup, "was in the business of selecting and distributing to a circuit of moving picture theaters, films and advertising matter accompanying them, under agreements with the various operators, some twenty or more in number, in various parts of the State" of Nebraska. (263 U. S. 302). Presumably, then, when films were delivered to Binderup by the defendant distributors, the same would be exhibited by him at these twenty or more theatres until he was through with them and they were returned to the distributors. Hence, the only material inquiry so far as the application of the Anti-Trust Act was concerned, was whether the transportation of the films to Binderup himself constituted interstate commerce. The defendant contended that the films came to rest at the local agency in Nebraska, and hence that the

shipment to Binderup was non-interstate, since the delivery was made by the local agency to Binderup in Nebraska. The plaintiff contended, on the other hand, that the detention, if any, of the film at the local agency in Omaha, did not put an end to the interstate character of the transaction—the transportation of the film from the New York office to Binderup in Nebraska, and with this contention, this Court agreed.

Obviously the Court did not decide, and had no occasion to decide, whether Binderup's actual exhibition of the films was a tax-exempt interstate activity.

We think the proper view with respect to the bearing of the *Binderup* case on the problem presented here, was taken by the dissenting justices in *Paramount Pictures Dist. Co. v. Henneford*, 184 Wash. 376, from whose opinion we quote the following (pp. 385-6):

"Notwithstanding the eminent authority upon which the majority rests its decision, I am convinced that it has misconceived the situation, has failed to see what operation is sought to be taxed, and has misapplied the doctrine of *Binderup v. Pathe Exchange*, 263 U. S. 291, 44 S. Ct. 96.

"For present purposes, we should disregard the fact that the films are produced outside of this state and are brought here through an interstate operation. All of that is wholly beside the present question.

"When and after the films arrive in this state, they are exhibited in local theaters for the joint benefit of the local exhibitors and the film owner. The proceeds of those wholly local exhibitions, which are paid to and received by the film owner, are the sole basis for the tax. As I see it, such proceeds are wholly derived from the local exhibitions.

"The process of exhibiting the films in all of the local theaters consumes wholly the commercial value of such films within this state. In other words, the films come to this state new, with their value intact, and are ex-

hibited from place to place within the state until their value within the state is wholly consumed and no commercial value within the state remains in them. They are thus, for all practical purposes, as wholly consumed within the state as would be a sack of flour shipped into the state, made into bread, and the bread then eaten. Nothing would remain of the flour, and nothing remains of the commercial value of the films in this state, save as it has been converted into money by the operation, and that money so earned within the state is wholly a local product and is the sole basis of the tax.

"No such question involving earnings through local exhibitions was involved in the *Binderup* case, *supra*, and not even remotely did the court undertake to decide such an issue. On the contrary, the court clearly pointed out that no such question was involved, saying:

" 'The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause. *Stafford v. Wallace*, 258 U. S. 495, 525-527; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245.'

* * * * * * * *

"In a case such as this, involving the purely local exhibition of films, the right of the soverign state to tax is so clear that no authority need be cited."

Inapplicability of Conspiracy cases in determining limitations of State's taxing power.

In considering the application of the *Binderup* case it is most important to bear in mind the observation repeatedly made by this Court that decisions holding activities or property subject to state taxation are not authority for the contention that such activities are immune from federal regulation under the Commerce Clause. May we repeat what was said in this connection in the *Binderup* case (quoted by dissenting justices in *Paramount Pictures Dist. Co. v. Henneford*, 184 Wash. 376, 386):

"The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. *It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause.* *Stafford v. Wallace*, 258 U. S. 495, 525-527; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245." *Binderup v. Pathe Exchange*, 263 U. S. 291, 311. (emphasis supplied)

And see also: *Swift & Co. v. U. S.*, 196 U. S. 375, 400.

The reason for the rule is apparent. Under certain circumstances, Congress may regulate intrastate commerce. Hence, authorities to the effect that certain activities are intrastate commerce, and hence subject to state taxation, are "'of little value" for the purpose of defining the limitations of valid Federal regulation under the Commerce Clause.

Thus, Congress has the unquestioned right to regulate intrastate commerce when the situation becomes such, by reason of the interblending of the interstate and intrastate operations, that adequate regulation of the particular commerce between the states cannot be maintained without regulating *intrastate* transactions of like character.

This rule is elaborately and convincingly explained in the well considered case of *Stafford v. Wallace*, 258 U. S. 495, 517 *et seq.* where the authorities are cited and reviewed. More recent cases affirming the same rule are: *Georgia Public Service Com. v. U. S.*, 283 U. S. 765; *Alabama v. U. S.*, 283 U. S. 776, and *U. S. v. Louisiana*, 290 U. S. 70.

It must necessaarily follow, of course, that since activities which are intrastate and therefore subject to

local taxation, may also be subject to federal regulation, conspiracy cases are of little if any value as authorities as to the limitation of state taxing power.

Indeed the Court has recognized this to be true in at least two comparatively recent cases:

Wiloil Corp. v. Pennsylvania 294 U. S. 169;
Minnesota v. Blasius, 290 U. S. 1.

Said the Court in the *Wiloil* case, a suit involving a state's right to exact an excise on gasoline delivered from without the state pursuant to a contract made within the taxing state:

"We need not consider whether deliveries to purchasers ended the interstate commerce involved, including all incidents that in other connections might constitute an essential part of that which is covered by the commerce clause. Cf. *Fed. Trade Comm'n v. Pacific Paper Assn.*, 273 U. S. 52, 63. Upon the principle applied here recently in *Minnesota v. Blasius,* 290 U. S. 1, the liquid fuels were taxable in Pennsylvania." (294 U. S. 175)

In the *Blasius* case, the Court, although finding that the dealings there involved in connection with livestock shipped to stockyards from points within and without the state, were so related to a current of interstate commerce as to be subject to federal regulation, yet held that while held in such stockyards such cattle were subject to local taxation. Quoting from the opinion (290 U. S. 8):

"But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a state may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the state. The distinction was recognized in *Stafford v. Wallace, supra,* pp. 525, 526 (258 U. S. 495), where the

court cited, as an illustration, the case of *Bacon v. Illinois*, 227 U. S. 504, in which such a non-discriminatory property tax was sustained."

And it is to be noted that in the *Wiloil* case, this same principle was held applicable to both excises and property taxes. To quote:

"And as that rule applies whether the burden falls directly or indirectly * * * it is not material whether the tax is upon the sale and delivery or upon the property." *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 175.

As already noted, in the *Binderup* case the Court was merely considering whether the interstate activities of the film companies were sufficient to bring them within the operation of the Sherman Anti-Trust Act. The Court did not undertake, and was not called upon to determine when the films ceased to be articles of interstate commerce. It simply held they were moving in interstate commerce up to the time of their receipt by Binderup, who was, himself, a distributor.

In *U. S. v. Interstate Circuit*, 20 Fed. Supp. 868, 873, the Court recognized that while the exhibition contract was interstate, "the exhibition, itself, of the moving picture is state commerce, and beyond the finger of regulation as interstate commerce."

Rental agreements not analogous to interstate sales.

It will be doubtlessly contended that the distributor's activities in renting films are no less interstate commerce than if the films were sold outright to the exhibitors. Our answer is that an interstate sale is interstate commerce and a tax thereon is a direct tax on interstate commerce forbidden by the commerce clause. But after

interstate transportation has ended, a non-discrimatory local tax either on the property itself or upon its use is neither a tax nor an unlawful burden on interstate commerce.

Henneford v. Silas Mason Co., 300 U. S. 577.

Where property has reached the destination of its first shipment, and is held there, not in necessary delay or accommodation to the means of transportation, but for the business purposes and profit of the owner, the interstate character of such property ceases, and its taxation by local authorities does not thereafter amount to a regulation or direct burdening of interstate commerce.

Pittsburgh & So. Coal Co. v. Bates, 156 U. S. 577;
Diamond Match Co. v. Ontonagon, 188 U. S. 82;
American Steel & Wire Co. v. Speed, 192 U. S. 500;
General Oil Co. v. Crain, 209 U. S. 211;
Susquehanna Coal Co. v. South Amboy, 228 U. S. 665;
Minnesota v. Blasius, 290 U. S. 1;
Edelman v. Boeing Air Transport, 289 U. S.249;
N. C. & St. L. Ry. v. Wallace, 288 U. S. 249, 266-8.

It is of course apparent that the performance of the rental agreement not only consumes the film itself, but exhausts the earning power of any other print of the original negative. Thus, during the entire useful existence of these films, the distributor directly benefits by the police and fire protection afforded by the states where exhibited. The distributor's entire income depends upon the state police protection thus afforded. Moreover, the state protects not only the distributor's films, but its income therefrom as well. It is fair to assume that the larger part of the distributor's revenues are from percentage contracts. Percentage rentals are not paid until

the end of the engagement or at least until the end of each day's exhibitions, and meantime are subject to state police and fire protection.

When the various states wherein the distributor operates are thus charged with the duty and expense of policing its property and activities, it cannot, we submit, be heard to deny the right of these states to exact of such activities their fair share of the expense necessary to the enjoyment of such protection.

Our position is well expressed by the Missouri court in *State ex rel. Hays v. Robertson*, 271 Mo. 475, 196 S. W. 1132, 1135-6, from which we quote:

"Interstate commerce, as to the particular phase confronting us, connotes trafficking transactions between citizens of different states, whereby the title of the seller in the commodity sold is transferred to the buyer, or agreed so to be upon the contingency of payment of the purchase price by installments or otherwise (*Kansas City v. McDonald*, 175 S. W. 917), not one wherein the property of the quasi seller is moved bodily into this state and leased for a long term of years for an exorbitant annual rental and to be returned to such seller at the end of the rental period.

"* * * In interstate commerce the delivery of the commodity to the purchasing citizen of another state may be either in the domicile of the vendor or of that of the vendee; it may be for cash, or on time, by giving credit and taking back security, by payment in full or by installments, but, if the title to the commodity does not pass, and is not to pass, certainly the business is not traffic; it is not buying and selling. It is but the bringing of the property of the foreign corporation into this state, and so dealing therewith after it is in the state as to make of such property a source of income to the foreign corporation. In short, it is a continued dealing by the foreign company with the property in this state after interstate commerce has wholly ceased its dealings therewith. If such acts do not constitute transacting business in this state, it is difficult to conceive what would be necessary

in order for a foreign corporation to transact business here. Nor does the fact that a studied effort to give to the transaction a false color of interstate commerce in any way change this view."

That rental agreement not made in taxing state, immaterial.

It will be contended that the distributor's use of these films for rental purposes are not taxable locally either because the rental agreements must be approved by the home office or because of license agreements made with other exhibitors.

But local activities, we answer, cannot be thus transformed by contract into interstate business.

"It is not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause."

Browning v. City of Waycross, 233 U. S. 16, 23;
Superior Oil Co. v. Mississippi, 280 U. S. 390, 394-5;
Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 22;
Western Live Stock v. Bureau of Revenue, 303 U. S. 250.

Where the contract is made is wholly immaterial. *Pacific Rys Advertising Co. v. Conrad*, 168 Cal. 91, 141 Pac. 916-7; *Packer Corp. v. Utah*, 285 U. S. 105.

Contracts are not articles of commerce. They are not subjects of trade and barter. They are not in and of themselves interstate transactions simply because the negotiations are interstate. *Paul v. Virginia*, 8 Wall. 168; *Hooper v. California*, 155 U. S. 648; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389; *Nutting v. Massachusetts*, 183 U. S. 553.

Said the Court in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 253:

"That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of congressional action, unless the performance is within its protection, is a proposition no longer open to question." (citing authorities.)

Effect of West Virginia's excise, if any, on interstate commerce, is remote, indirect and incidental, and hence it does not offend Commerce Clause.

A non-discrimatory state tax which only indirectly or remotely burdens interstate commerce is not obnoxious to the commerce clause.

Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, 294;

Western Cartridge Co. v. Emmerson, 281 U. S. 511, 514;

Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 267-68;

Southern Gas Corp. v. Alabama, 301 U. S. 148, 157.

The criterion frequently applied in recent cases to determine when a state tax measured by gross receipts constitutes a direct and hence unconstitutional burden, and when merely indirect and incidental, and hence, a permissible burden on interstate commerce, is that of potential multiple taxation. Said the Court in the recent case of *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 255-6:

"The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. * * * The multiplication of state taxes measured by the gross receipts from inter-

state transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove."

And to the same effect see: *Coverdale v. Pipe Line Co.*, 303 U. S. 604, 612, and *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 311-314.

It is to be noted that in the *Coverdale* and *Western Live Stock* cases the Court's analyses demonstrated that the offending excises were not taxes which in form or substance could be repeated by other states in such manner as to lay an added burden on interstate commerce, and the excises were sustained.

In the *Storen* case, on the other hand, it was found that the tax was of such a character that, if valid, it could be laid by the other states affected by the transactions, and hence the tax was condemned as offensive to the Commerce Clause.

Applying this test to the tax here involved, it is at once apparent that no state other than West Virginia could impose an excise measured by the rentals paid appellee by West Virginia exhibitors. Obviously, any tax thus sought to be imposed, would be extra-territorial in its operation and clearly violative of the due process clause.

We believe that the following language of the Court may well be applied here:

"But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not

be burdened with cumulative exactions which are not similarly laid on local business." *Western Live Stock v. Bureau*, 303 U. S. 250, 358.

For the reasons urged, we respectfully submit that the decree of the statutory three-judge court should be reversed, and the suit dismissed.

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Assistant Attorney General of the State of Washington,
Amici Curiae.



SUPREME COURT OF THE UNITED STATES.

No. 161.—October Term, 1938.

Ernest K. James, Individually and in his official capacity as Tax Commissioner for the State of West Virginia, Appellant,
vs.
United Artists Corporation.

Appeal from the District Court of the United States for the Southern District of West Virginia.

[January 3, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

This appeal requires consideration of but a single question: whether appellee is subject to the provisions of a statute of West Virginia which lays a tax, measured by gross receipts, "Upon every person [including corporations] engaging . . . within this state in the business of collecting incomes from the use of real or personal property. . . ."

Appellee, a Delaware corporation, having an office and its principal place of business in New York City, brought the present suit in the District Court for southern West Virginia against appellant, a West Virginia tax official, to restrain collection of a tax imposed by Article 13 of Chapter 11 of the West Virginia Code, as amended March 9, 1935, by c. 86, West Virginia Laws of 1935, on the ground that the appellee was not, by the terms of the statute, subject to the tax, and that the tax was an unconstitutional burden on interstate commerce.[1]

The district court, three judges sitting, adopted as its findings the facts as stipulated. It found that the amount of the tax exceeded $3,000 and that such judicial remedy as there was under West Virginia law for recovery of the tax, if paid, was not en-

[1] The suit was begun before the enactment on August 21, 1937, of the amendment to § 24 of the Judicial Code, 50 Stat. 738, providing that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." Section 2 of the Act excludes from its operation suits begun in the district courts before its enactment.

forceable at law in the federal courts, and that by reason of penalties for nonpayment, some of which were cumulative, appellee was without adequate legal remedy. The court concluded that appellee was not doing business in West Virginia or engaged there in the business of collecting income from the use of personal property, within the meaning of the applicable taxing act, and that the attempted tax was an unconstitutional burden on interstate commerce, and decreed that collection of the tax be permanently enjoined. 23 F. Supp. 353. The case comes here on appeal under § 266 of the Judicial Code, 28 U. S. C. § 380.

Section 2 of Article 13, c. 11, of the West Virginia Code, as amended, lays annual privilege taxes upon various businesses and activities carried on within the state. Section 2(g) imposes a tax of one-half of one per cent. of the gross income derived from the business of operating a theatre or moving picture show. Section 2(h) taxes the gross receipts of every person engaging within the state in any business not otherwise specifically taxed, and § 2(i) levies upon "every person engaging . . . within this state in the business of collecting incomes from the use of real or personal property" a tax of one per cent. "of the gross income of any such activity".

Appellee is engaged in the business of distributing motion picture films for exhibition in theatres in various states, including West Virginia. It maintains branch offices in Ohio, Pennsylvania, and the District of Columbia, but has no office or place of business in West Virginia, and has no agents or employees in the state other than a traveling representative who visits the state to solicit from theatre managers or owners contracts for the exhibition there of films to be supplied by appellee. Appellee owns no property in West Virginia other than the films sent there temporarily for exhibition and afterward returned to it at points without the state.

In the course of its business appellee from time to time makes public announcements of its offering of films. Theatre owners or managers in West Virginia sign written applications in the form of offers for license contracts permitting the exhibition in West Virginia of such films as they desire to show there. The signed applications are transmitted to appellee's New York office, where it accepts or rejects them. When they are accepted, appellee signs a written acceptance attached to the application and returns the

executed contract to the exhibitor. The subsequent course of business between appellee and the West Virginia exhibitor conforms to the terms of the contract. It calls for the delivery of the films by shipment from any of appellee's exchanges to the exhibitor in West Virginia, and provides for exhibition of the films for a specified period, for which the exhibitor undertakes to pay a fixed sum or a percentage of the receipts from exhibition, and for the return of the films by the exhibitor after they are shown, by shipping them to another exhibitor or to one of the appellee's exchanges, as appellee may direct.

When the license is upon a percentage basis, the exhibitor undertakes to segregate appellee's percentage of the box office receipts and to hold it "in trust" and pay it over to the appellee daily. But the contract provides that "Any and all payments to be made hereunder shall be payable to the Distributor at the city in which is located the Exchange from which the Exhibitor is served," and all payments due appellee from West Virginia exhibitors are sent by them to appellee at points without the state.

Upon the argument the state conceded that the exhibitors of appellee's films in West Virginia are subject to and pay the tax imposed on operators of moving picture houses by § 2(g) and that the tax is measured by the entire gross receipts from exhibiting the films, ascertained without deducting the percentage payable to appellee. The Attorney General of the state disclaimed any contention that appellee was taxable under § 2(h), see *Pennywitt* v. *Blue, State Tax Commissioner,* 73 W. Va. 718, or under any provisions of the statute other than those of 2(i) laying a gross receipts tax on every person engaging within the state in the business of collecting incomes from property.

The Supreme Court of West Virginia appears not to have construed this section, and we are without the benefit of any legislative history of the statute indicating that it has any purpose or meaning other than that suggested by its words. We are not here concerned with the question whether a state, by a statute appropriately framed, may lay a tax on income derived from sources within it, or whether the solicitation of the contracts may be taxed. No such taxation is attempted by § 2(i). The taxing provisions of § 2 are restricted in their application to various enumerated classes of activities within the state, one of which, specified in § 2(f), is

that of engaging there in the business of collecting incomes. The conduct of such a business or activity by appellee requires its presence there, or that of its agent, and the collection of income within the state by the one or the other. As it is stipulated and found that appellee carries on no business within the state, except such as is involved in solicitation of the contracts, and has no collection agent there, and as the exhibitors there are bound to and do pay all sums due under their contracts to appellee at points outside the state, we can find no basis for saying that it is engaged in collecting income within the state, either as a business or otherwise.

The contract requirement that the exhibitor is to set apart the appellee's percentage of the gross receipts "in trust" is a familiar device for securing payment to the appellee in the event of the exhibitor's financial embarrassment. But it does not make the exhibitor appellee's agent, nor does it dispense in law, more than it has in fact, with the performance of the former's obligation to make all payments to appellee without the state. The emphasis placed by § 2 and its various subsections on the carrying on of business or other specified activities within the state as the condition of laying the tax, and the fact that the exhibitors' receipts are taxed in their hands under § 2 (g), lead to the conclusion that there was no legislative purpose in cases like the present to tax gross receipts apart from the business or activity of collecting them, carried on within the state. We cannot say that the court below was wrong in that conclusion.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.